

Local 103, International Brotherhood of Electrical Workers, AFL-CIO and Comm-Tract Corp. and Communications Workers of America, AFL-CIO and its Local 4340. Case 1-CD-901

April 30, 1992

DECISION AND DETERMINATION OF DISPUTE

CHAIRMAN STEPHENS AND MEMBERS DEVANEY
AND OVIATT

The charge in this Section 10(k) proceeding was filed November 25, 1991,¹ and amended December 6, by Comm-Tract Corp. (the Employer) alleging that the Respondent, Local 103, International Brotherhood of Electrical Workers, AFL-CIO (Local 103) violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by the Communications Workers of America, AFL-CIO (CWA) and its Local 4340. The hearing was held January 8 and 9, 1992, before Hearing Officer Gerald Wolper.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, a Massachusetts corporation with its principal place of business located at 360 Second Avenue, Waltham, Massachusetts, is engaged in the design, engineering, installation, and servicing of voice and data systems. The Employer annually receives goods and materials valued in excess of \$50,000 directly from points outside the Commonwealth of Massachusetts. The parties stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Local 103, the CWA, and its Local 4340 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

State Street Bank contracted with AT&T to install a fiber optic system in its buildings in Quincy, Massachusetts. AT&T subcontracted with the Employer to install fiber optic cable between the buildings at the State Street Bank complex, to bring the cable into the Palmer Building, terminate it on a switch panel there, and to complete the necessary splicing, testing, and

documentation. The Employer began its work on the project in early November. The employees performing the work are covered by a collective-bargaining agreement between Local 4340 and the Employer effective November 1990 through November 1993.

State Street Bank also contracted with Massachusetts Electric Construction Company (Mass Electric) to perform wiring installation work inside the Palmer Building. Mass Electric's employees are represented by Local 103. Mass Electric has no contract with AT&T covering the work assigned to the Employer.

On November 15, the Employer's president, John Polmonari, received a phone call from Comm-Tract employee Rick Blades. Blades said that a problem had arisen at the jobsite with Local 103 and asked that a steward come to the site.

The following Monday, November 18, Polmonari and Local 4340 Steward Vince Tamburello, also an employee of Comm-Tract, met with Blades and Local 103 Steward Bill Harvey. Harvey said that although he did not have a problem with Comm-Tract being on the jobsite, Local 103 Shop Steward Dick Kelly might have a problem. Kelly was not at the jobsite at the time.

On November 21, Comm-Tract employee David Steere met Kelly as Steere was picking up panels left by AT&T to be installed by Comm-Tract. Kelly told Steere that he had a problem with the employees represented by the CWA being on the job, that the CWA was not supposed to be there and if its employees remained, it was possible that the IBEW people would walk off the job. Steere called Polmonari and asked him to speak to Kelly. Kelly told Polmonari that the CWA did not live up to community standards, that this work had to be performed by Local 103, and if Comm-Tract employees continued to perform the work, the employees represented by Local 103 would walk off the job. Polmonari asked Kelly if Local 103 was claiming this work and if that meant that Comm-Tract and the CWA could not perform it. Kelly said yes.

AT&T engineering operations manager, Michael Collins, testified that he was told by his design engineer, Frank O'Keefe, that Local 103 Business Agent Donn Berry told O'Keefe that the work being done at State Street was supposed to be done by Local 103 and that AT&T "should have been aware that State Street work is 103 work." According to Collins, the request for proposals (RFP) received by AT&T from State Street only specified "union labor," not any specific union or local.

When Collins called Berry to ask about the problem at the Palmer Building, Berry said that the CWA "should understand that that's 103 work up there." Collins replied that it was not specified in the RFP like that. Berry then mentioned Local 103's ongoing rela-

¹ All dates are in 1991 unless otherwise stated.

tionship with State Street Bank in that State Street held all of Local 103's pension and trust funds, and Local 103 does State Street's work.

On November 21, Mass Electric General Foreman Joe White was asked by Bill Levine, a consultant to State Street, whether the Mass Electric employees could supervise the Comm-Tract employees in their duties. White asked his superiors and was told that that would be feather bedding and Local 103 would not permit it. Later, Levine asked White if Mass Electric employees could complete the work under the supervision of Comm-Tract employees. White consulted with his superiors and responded that that would be allowable. When this idea was suggested to Polmonari, he rejected it.

On November 22, Polmonari and Local 4340 Director Phil Magnone went to the jobsite and met with Dick Kelly. Initially, Kelly told them that the dispute concerned "community standards," but added that it was more involved than that because Local 103 had \$200 million in pension fund money in the State Street Bank and that, in turn, Local 103 should get the work at the State Street Bank. Kelly then stated "basically it's our work, we want it and that's the direction from the Local."

Before leaving, Magnone noticed that AT&T employees represented by IBEW, Local 2222, were working on the switch in the Palmer Building and asked why they were there. Kelly replied that "they belong to IBEW, that's okay."

To prevent any disruption of the job, State Street requested AT&T to remove the Comm-Tract employees from the jobsite. AT&T informed the Employer of this request and the Comm-Tract employees stopped work at the site. It was generally agreed that the remaining work would take about 1-1/2 days to complete.

B. Work in Dispute

The disputed work involves the installation of the fiber optic cable between the buildings of the State Street Bank complex in Quincy, Massachusetts, through the existing manhole system, including splicing, terminations, testing, and documentation, and the installation of voice and data systems.

C. Contentions of the Parties

The CWA contends that there is reasonable cause to believe that Local 103 violated Section 8(b)(4)(D) of the Act and that the Board must therefore determine the merits of the dispute. The CWA cites the testimony of Employer President Polmonari and employee Steere relating to Local 103 Steward Dick Kelly's threats to employees represented by the CWA that, if they continued working at the site, there would be a walkout by employees represented by Local 103. CWA further contends that the testimony shows that shortly after

Comm-Tract employees started to pull the cable into the Palmer Building, a "problem" was created, which led the communications consultant, Levine, to ask Mass Electric Foreman Joe White if Local 103 employees could be assigned to supervise Comm-Tract employees as they completed the work. When informed that Local 103 would not permit such an arrangement, Levine asked White if it would be all right with Local 103 to have its members perform the disputed work, under Comm-Tract supervision. When advised that Local 103 would permit this arrangement, it was suggested to Polmonari, who rejected it. The CWA contends that the work in dispute should be awarded to Comm-Tract employees on the basis of the Employer's preference and past practice, its collective-bargaining agreement with Local 4340, and economy and efficiency of operations. The CWA has requested that the Board issue a broad order based on the evidence that similar disputes may occur in the future.

Local 103 contends that State Street Bank, the owner of the site, is a party in interest to this proceeding because it, and not Comm-Tract, has the "ultimate control" over the assignment of the work in dispute. In this regard, Local 103 contends in its posthearing brief² that State Street's absence from the hearing constitutes a procedural defect requiring that the notice of hearing be quashed.

Local 103 maintains that no jurisdictional dispute exists because Local 103 made no threats with respect to the assignment of the work to AT&T or State Street, the parties who Local 103 contends are the "employers" for the purposes of this proceeding. Local 103 also claims that the decision to exclude Comm-Tract employees from the site was purely a business decision made by AT&T at the request of State Street. Local 103 contends that this issue was instigated by Comm-Tract solely for the purpose of getting a broad order against Local 103. Finally, Local 103 contends that at the hearing it disclaimed the "initial work covered by this hearing" and that it has no objection to Comm-Tract finishing up the job.

On the merits, Local 103 contends that the work should be assigned to employees it represents because of State Street's preference, area and industry practice, relative skills, and economy and efficiency of operations. As to the CWA's request for a broad order, Local 103 maintains that the order in this case should be limited to the particular work and parties giving rise to this proceeding because there was no testimony of any unlawful activity by Local 103 which caused undue hardship or loss to Comm-Tract.

²At the hearing, Local 103 claimed in its opening statement that it was AT&T who had control over the assignment of the disputed work.

D. Applicability of the Statute

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and the parties have not agreed on a method for the voluntary adjustment of the dispute.

As discussed above, testimony was presented in this case that Local 103 claimed the disputed work, stated that the CWA-represented employees should leave the jobsite, and threatened that if they did not leave, Local 103-represented employees would walk off the job.

This evidence is disputed by testimony presented by Local 103 that it did not threaten to engage in prohibited conduct or make a demand for the work. In a 10(k) proceeding, however, the Board is not charged with finding that a violation did in fact occur, but only that reasonable cause exists for finding such a violation. Thus, a conflict in the testimony need not be resolved in order for the Board to proceed to a determination of the dispute. *Laborers Local 334 (C. H. Heist Corp.)*, 175 NLRB 608, 609 (1969). We find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and, based on the record before us, that there exists no agreed-upon method for the voluntary adjustment of this dispute. Accordingly, we find that the dispute is properly before the Board for determination under Section 10(k) of the Act.

We also find that Local 103's purported disclaimer is ineffective. At the hearing, Local 103 disclaimed "the installation and splicing of the fiber optic cable" through the streets and down State Street South. When asked about the installation of the voice and data systems, Local 103's attorney maintained that Local 103 was not willing to give up that work, which it maintained was within the jurisdiction of Local 103. The record further establishes that at the close of the hearing on January 9, 1992, a substantial portion of the disputed work had been completed. Local 103 Business Agent Donn Berry testified that he could see "no reason why [the work] couldn't be cleaned up by Comm-Tract, because as I understood it, there was something like an hour and a half's work left." Because Local 103 did not disclaim this work before the hearing, and there was little work left to disclaim at the time of the hearing, it is clear that Local 103 "did not seek to effectively disclaim the disputed work but sought instead to escape the consequences of its improper actions." *Electrical Workers IBEW Local 3 (Mike G. Electric)*, 279 NLRB 521, 523 (1986). Further, the Board has held that a disclaimer of only a portion of the work in dispute does not constitute an effective disclaimer of interest in the work. *Laborers (Paschen Contractors)*, 270 NLRB 327, 328 (1984). Local 103's attempted disclaimer is therefore ineffec-

tive because it was incomplete and was presented solely to avoid an authoritative decision on the merits.

Finally, we find no merit to Local 103's contention that State Street Bank should have been included as a party in interest in this proceeding because, as owner of the premises, it had "the ultimate proprietary power to nullify the contracts of either AT&T or Comm-Tract." AT&T subcontracted with Comm-Tract to perform the work in dispute and Comm-Tract had the discretion to assign the disputed work to whichever group of employees it desired. In this regard, we note that it was Comm-Tract's decision to assign the work to employees represented by the CWA and its Local 4340 in the first instance. See *Operating Engineers Local 139 (McWad, Inc.)*, 262 NLRB 1300, 1302 (1982). Because we find that Comm-Tract exercises sufficient control over the assignment of the disputed work for it to be considered the employer for purposes of this proceeding, we deny Local 103's motion to quash the hearing and find that the dispute is properly before the Board for determination.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of the dispute.

1. Certification and collective-bargaining agreements

Neither Union has been certified as the collective-bargaining representative of the Employer's employees. However, the Employer has been party to a series of collective-bargaining agreements with Local 4340 since 1980 covering the installation of voice and data communications systems. The current collective-bargaining agreement is effective November 1990 through November 1993. The Employer has no contract with Local 103. Therefore, this factor favors an award of the disputed work to employees represented by Local 4340.

2. Employer preference and past practice

The Employer's president, John Polmonari, testified that the Employer prefers to use employees represented by Local 4340 to perform the disputed work and that this has been its practice since 1980. There is no evidence that employees represented by Local 103 have ever performed this work for the Employer. The Em-

ployer's preference in this regard is uniform as to all of its projects.

Local 103 contends that State Street, the owner of the site and party with the "ultimate control" over the assignment of the work, prefers that employees represented by Local 103 perform the work because they have been doing similar work on the site for 6 years.

Because we have found that Comm-Tract is the Employer for purposes of this proceeding, we find that the factor of employer preference and past practice favors an award of the disputed work to employees represented by Local 4340.

3. Area and industry practice

Both the CWA and IBEW have contracts with various employers in Eastern Massachusetts engaged in the installation and servicing of voice and data transmission systems, which is similar to the work in dispute. Thus, we find that this factor does not favor an award of the disputed work to employees represented by either Union.

4. Relative skills

Polmonari testified that Comm-Tract employees are trained by the Employer in the use of its own equipment, are highly skilled, and are performing work of acceptable quality to the satisfaction of the Employer and to the contractor in this dispute, AT&T, both at this site and at other sites.

Polmonari testified that in one instance, the Employer subcontracted five terminations to be performed by employees represented by Local 103. The employees represented by Local 103 were unable to perform the terminations and the work ultimately had to be performed by Comm-Tract employees. Polmonari testified that the Employer's cost on the project went up drastically.

Local 103's assistant training director, Joseph Gambino, testified that Local 103 has a 4-year telecommunication apprenticeship program in Massachusetts that has been registered at both the state and Federal levels. In addition to on-the-job training, its apprentices receive 150 hours of in-class training per year.

It appears that both groups of employees are sufficiently skilled to perform the disputed work. Therefore, we find that this factor does not favor either group of employees.

5. Economy and efficiency of operations

Polmonari testified that it is more efficient and economical for the Employer to assign the work in dispute to its own full-time employees who are represented by Local 4340 because they are specifically trained on the operation and use of the Employer's own equipment.

Local 103 asserts that employees represented by it have been performing voice and data installation at the State Street site for 6 years and that they have a general knowledge of the job which could be useful when performing postinstallation warranty work.

Based on the testimony presented, we find that this factor favors awarding the disputed work to employees represented by Local 4340.

Conclusions

After considering all the relevant factors, we conclude that employees represented by Local 4340 are entitled to perform the work in dispute. We reach this conclusion relying on the collective-bargaining agreement between the Employer and Local 4340, employer preference and past practice, and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by Local 4340, not to the Union or its members.

Scope of the Award

The CWA and the Employer contend that the determination should encompass all the voice and data installation work, including the installation of the fiber optic cable, within the Route 128 perimeter in Eastern Massachusetts. For the Board to issue a broad, areawide award, there must be evidence that the disputed work has been a continuing source of controversy in the relevant geographic area and that similar disputes may occur in the future. There must also be evidence which demonstrates that the charged party has a proclivity to engage in unlawful conduct to obtain work similar to the disputed work. *Electrical Workers IBEW Local 211 (Sammons Communications)*, 287 NLRB 930, 934 (1987).

The Board has previously determined a jurisdictional dispute involving the Employer, CWA, and Local 103. In *Electrical Workers IBEW Local 103 (Comm-Tract)*, 289 NLRB 281 (1988), the Board awarded the installation of telephone and data systems equipment, including the associated cabling and connections, to the Comm-Tract employees represented by the CWA rather than to the employees represented by Local 103, relying on the Employer's collective-bargaining agreement, the Employer's preference, area practice, relative skills, and the economy and efficiency of operations. In that case, the Employer requested a broad award based on its offer of proof during the hearing that Local 103 was engaged in a broad pattern of unlawful 8(b)(4)(D) conduct and that the particular conduct in that case was only a part of the entire pattern. In its decision, the Board noted that it had not previously determined jurisdictional disputes involving the Employer and Local 103. Further, there was no evidence that Local 103 had claimed similar work to be performed by the Employer in the future. Accordingly, the Board

found the evidence insufficient to show that the dispute was a regularly recurring one and that Local 103 had a propensity to engage in conduct prohibited by Section 8(b)(4)(D). Thus, the Board limited its determination to the particular controversy that gave rise to the proceeding.

Unrebutted testimony was presented at the hearing in the instant case of other instances in which Local 103 threatened that employees it represents would walk off the job if the Employer did not assign certain telecommunications work to employees represented by it rather than to employees represented by the CWA.

Employer President Polmonari testified that in November 1990, the Employer had contracted to do cable installation work for the Easel Corporation in Burlington, Massachusetts. While performing the work, Polmonari was told that Local 103 Agent Donn Berry had warned the owner of the building that if Comm-Tract continued working there, employees represented by the IBEW would walk off the job. When Comm-Tract sent its employees in to start the work, the IBEW-represented employees refused to go into the building. The IBEW walkout lasted 3 to 4 days.

In September 1989, Comm-Tract was removed from the Bank of New England jobsite at 125 Summer Street in Boston. Bank representative O'Neill informed the Employer that he was told by Local 103 Representative Gambino that if Comm-Tract did not get off the job, Local 103-represented employees were going to leave. There was more work on the site that Comm-Tract had intended to bid on. However, O'Neill told the Employer that it could not allow it to bid on the work because employees represented by Local 103 would walk off the job. The Employer was allowed to finish its initial work, but could not bid on any further work.

Although no charges were filed in the above two instances, the testimony demonstrates that threats similar to those made in this case have been directed at the Employer at other projects in Eastern Massachusetts, and have in fact resulted in downtime on the projects and lost work for Comm-Tract employees. Thus, it appears that assigning work similar to the disputed work

will continue to be controversial, as the Employer intends to continue assigning the work to employees represented by Local 4340, and Local 103 has shown by its conduct that it will likely resort to conduct prohibited by Section 8(b)(4)(D) in order to obtain that work for employees it represents.

In light of the prior 10(k) determination and all the evidence presented in this case, we find that there is sufficient evidence that similar disputes may occur on other Comm-Tract sites in the future. Accordingly, our determination in this case applies to all similar disputes concerning work at the Employer's sites where the geographical jurisdictions of Local 103 and Local 4340 coincide.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of the Employer represented by the Communications Workers of America, AFL-CIO, Local 4340 are entitled to perform the work of installing the fiber optic cable between buildings via the existing manhole system, including splicing, terminations, testing, and documentation, and the installation of voice and data systems at the State Street Bank complex in Quincy, Massachusetts, and at any other of the Employer's projects where the jurisdictions of Local 103, International Brotherhood of Electrical Workers, AFL-CIO and Communications Workers of America, AFL-CIO, Local 4340 coincide.

2. Local 103, International Brotherhood of Electrical Workers, AFL-CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require the Employer to assign the disputed work to employees represented by it.

3. Within 10 days from this date, Local 103, International Brotherhood of Electrical Workers, AFL-CIO shall notify the Regional Director for Region 1 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.